IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 20042 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE AKSHAY H.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DEVABHAI PARBATBHAI AVADIA & 3 - Petitioner(s)
Versus
P D WAGHELA - COMPETENT AUTHORITY & 5 - Respondent(s)

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Appearance :
MR NK PAHWA for M/S THAKKAR ASSOC. for Petitioner(s) : 1 - 4.
MR SUNIT SHAH, GP for Respondent(s) : 1 - 2.
MR AR THACKER for Respondent(s) : 3 - 6.

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CORAM : HONOURABLE MR.JUSTICE AKSHAY H.MEHTA

Date : 03/09/2007

CAV JUDGMENT

This Court issued Rule on the petition on 24/8/2007. Mr. Sunit Shah, Ld. GP waived service of rule for respondents nos. 1and 2 and Mr. AR

Thakkar, learned advocate waived service of rule for respondents nos. 3 to 6. At the request of the learned advocates for the parties and looking to the urgency, the petition was taken up for final hearing on 24/8/207 itself. The hearing got concluded on 29/8/2007. Thereafter, the petition has been adjourned to 03/09/2007 for pronouncement of the judgment. Now it is being disposed of by this CAV judgment.

2. The petitioners herein seek to challenge the proceedings initiated against them under the provisions of The Gujarat Provision for Disqualification of Members of Local Authorities for Defection Act, 1986 [hereinafter referred to as 'the Act'] and The Gujarat Provision for Disqualification of Members of Local Authorities for Defection Rules, 1987 [hereinafter referred to as 'the Rules'] as also The Gujarat Provision for Disqualification of Members of Local Authorities for Defection (Amendment) Rules, 2007 [hereinafter referred to as 'the Amendment Rules']. The proceedings have been initiated against the petitioners by issuing notice dated 18/7/2007 by the Designated Officer intimating the petitioners that despite the mandate or direction having been issued by one Shri Arvindbhai Kalyanjibhai belonging to Bharatiya Janta Party [hereinafter referred to as 'BJP'] for not casting the vote against the party's direction in the meeting scheduled to be held on 2/7/2007, the petitioners had casted votes against the direction in the extra-ordinary general meeting of the municipality for electing the President and thereby they had committed breach

of the mandate. It is stated in the notice that Shri Arvindbhai and other members have filed petition for disqualifying the present petitioners as members of the Municipality, hence, if they had anything to say in response to the said petition, they should file it in writing on or before 14/8/2007 and if they intended to make personal representation, they should remain present at 11.30 a m on 21/8/2007 either in person or through any advocate. The said notice has been issued under the provisions of the Act.

3. The record of the petition shows that respondents nos. 3 to 6 have filed petition purporting to be under the provisions of rule 6 of the Rules against the present petitioners stating that the President of Morbi Nagar Palika, namely Shri Pradipbhai Vala, who was elected as member of the BJP, had tendered his resignation and therefore, a meeting was convened on 02/07/2007 at 12.00 noon in the common hall of the Nagar Palika for holding the election of the President. The meeting was convened under the chairmanship of the Deputy Collector, Morbi. It is stated in the said petition that respondents nos. 3 and 4 are the members of Municipality elected under the banner of BJP; whereas respondents nos. 5 and 6 are the President and the Secretary of the BJP of Morbi City. It is stated that on 30/6/2007 meeting of the councilors, who got elected on BJP ticket and symbol was convened to decide that the BJP should make one of its councilors to contest the post of President and other councilors of the BJP to support him. In pursuance of the said decision, a direction was later on issued by the President and the Secretary to all the councilors

belonging to BJP to vote for councilor Narsinhbhai Vastabhai Dabhi. It is further stated that on coming to know about the direction, the present petitioners who had already surreptitiously joined hands with the opposite party, namely Congress, did not accept the mandate and when efforts were made to convey it on mobile phone, they switched off their handsets. Thus, they deliberately did not accept the mandate. It is further stated that under the provisions of the Act it was the duty of the petitioners to ascertain whether there was any mandate from the party, but that was not done and they intentionally avoided doing it and they did not care to find out whether any mandate was issued by the party. They, of-course, knew that there was such mandate issued by the party. It is also stated in the said petition that present petitioner no. 1 himself intended to contest the presidential post and three other petitioners intended to support him and, therefore, they acted against the mandate of the party. Ultimately in the meeting of 02/07/2007 when the proposal for electing Shri Narsinhbhai Vastabhai Dabhi as the President was moved, the petitioners did not support it, instead they supported the proposal of one Naranbhai A Dhranga of Congress i.e., opposition moved for the name of petitioner no. 1 as President and ultimately he got elected. It is further stated that for casting vote against the mandate they did not obtain any permission of the office bearers of the party. Subsequently also the petitioners have not been pardoned by the party for casting vote against the mandate of the party. On these averments it is stated in the said petition that the present petitioners

committed breach of certain provisions of the Act and the Rules relating to the same and, therefore, they are liable to be disqualified as members under the Act and they cannot be continued as councilors of the Morbi Nagar Palika. A declaration to that effect has been sought in the petition. The petition is annexed with certain documents and it is stated in the petition that respondents nos. 3 to 6 rely on the said documents and they are to be treated as integral part of the petition.

4. The said petition was filed on 13/7/2007 before the Chief Secretary, Government of Gujarat at Gandhinagar, which has now been referred to respondent no. 1 as Designated Officer appointed under the Act. The petitioners instead of responding to the show cause notice and filing reply to the petition before the Designated Officer, have chosen to file present petition before this Court.

5. I have extensively heard Mr. Navin K Pahwa, learned advocate of M/s. Thakkar Associates for the petitioners, Mr. Sunit Shah, Ld. GP for respondents nos. 1 and 2 and Mr. AR Thakkar, learned advocate for respondents nos. 3 to 6. I have also carefully perused the record of the petition. It clearly appears from it that the petitioners have been elected as councilors of Morbi Nagar Palika which has 42 members. The petitioners have been elected on the ticket of the BJP. It is also clear that one Pradipbhai Vala had remained as President for the period of about 19 months and his term was to expire on 20/06/2008. However, he resigned from the post and, therefore, fresh election

for electing the President was required to be held on 02/07/2007. The allegation against the petitioners is that despite the mandate of the party, they did not vote for the presidential candidate of the BJP, namely Narsinhbhai Vastabhai Dabhi, but voted for petitioner no. 1, who contested the election with the support of the opposition – Congress party. It is further alleged that the petitioners deliberately avoided to receive the mandate since they had conspired to join hands with opposition and, therefore, they are liable to be disqualified as councilors of the Nagar Palika. It is submitted by Mr. Pahwa that the petition before the Designated Officer is liable to be dismissed solely on the ground that it is not in consonance with the mandatory provisions of the Act as well as Rules. According to him, the minutes of the meeting held on 02/07/2007 show that there were 41 members present in the meeting and 3 names were proposed for presidential post. However, subsequently, out of 41 members, 19 staged a walk out including Narsinhbhai Vastabhai Dabhi, whose name was proposed by one Anilkumar Mehta and supported by respondent no. 3. Ultimately petitioner no. 1 was elected. He has further submitted that the minutes nowhere show that any mandate was given by any party. According to him, under the provisions of rule 10 it was the duty of the Chairman of the meeting to verify whether there was any mandate issued by political party and circulated to the councilors. He has further submitted that according to rule 6, no reference of any question as to whether a councilor or member has become subject to disqualification under the Act can be made except by a petition by a councilor or member in

accordance with the provisions of the Rules. However, in the instant case, it is an admitted position that respondent nos. 5 and 6 are not councilors, but they are the office bearers of BJP of Morbi City. Hence, the petition at their instance is not maintainable. He has further submitted that such petition has to be signed by the petitioner thereof and verified in the manner laid down in the Code of Civil Procedure [CPC]. However, in the instant case the petition is not verified in accordance with the provisions of Order 6 Rule 15 of the CPC and the annexures thereto are not at all signed and verified. This requirement is mandatory and, therefore, non-compliance thereof renders the petition liable to be dismissed. According to him, when the mandatory provisions are not complied with while making the petition, the Designated Officer has no option but to dismiss the petition in accordance with rule 7 (2) of the Rules. In support of his submissions, Mr. Pahwa has also placed reliance on several decisions of this Court as well as of the Apex Court.

5.1. As against that, Mr. Sunit Shah has submitted that the petitioners have approached this Court at the notice stage and whatever they contend here can be contended before the Designated Officer. This petition is, therefore, premature. He has submitted that so far as the making of the petition by non-members or councilors is concerned, the requirement is only directory and not mandatory and, therefore, petition at the instance of leaders of the party can also be entertained. He has submitted that the verification of the petition is in accordance with the provisions of the Order 6 Rule 15 and even assuming that

it is not so, the defect can be cured at a later stage. He has further submitted that the petition involves several disputed questions of fact and when there is alternative efficacious remedy available under the Act, there is no need to entertain this petition. He has further submitted that if there is substantial compliance of the provisions, the petition is maintainable. He has placed reliance on certain decisions of the Apex Court and this Court.

5.2. It is submitted by Mr. Thakkar that the petitioners have been served with the notice dated 18/7/2007 on 21/7/2007 and they have been called to furnish their reply by 14/8/2007. Instead of filing the reply before the Designated Officer, they have approached this Court by filing this petition. According to him, the petitioners ought to have responded to the notice. He has submitted that the petitioners knew about the mandate of the party, but they deliberately avoided it with a view to see that petitioner no. 1 got elected as President with the support of Congress Party. He has submitted that petition against notice can only be entertained in certain circumstances, but in the present case no such circumstances exist; hence, the petition is required to be dismissed. Mr. Thakkar has also placed reliance on certain decisions of the Apex Court and this Court.

5.3. In reply to the arguments of respondents, Mr. Pahwa has submitted that assuming that there was mandate of the party, in fact, it is respondents nos. 3 and 4 and other councilors of BJP who are liable to be disqualified because instead of following the mandate of the party, they staged

a walk out and did not vote for their candidate. He has submitted that when the consequences of non-compliance of mandatory provisions are envisaged in the Act, the non-compliance of such provisions cannot be condoned nor any opportunity to rectify the same can be granted at a later stage. He has, therefore, submitted that the notice dated 18/7/2007 may be quashed and the proceedings before the Designated Officer be dismissed.

6. Before I commence the discussion on the submissions advanced by the learned advocates for the parties, it is necessary to refer to certain provisions of the Act as well as the Rules. Section 3 of the Act provides for disqualification on the ground of defection. The relevant part of the section is reproduced below :-

> "**3 : Disqualification on ground of defection:** (1) Subject to the provisions of Sections 4 and 5, a councillor or a member belonging to any political party shall be disqualified for being councillor or a member;-
>
> (a) xxx xxx xxx xxx
>
> (b) If he votes or abstains from voting in any meeting of a municipal corporation, panchayat or as the case may be, municipality contrary to any direction issued by the political party to which he belongs or by any person or authority authorized by it in this behalf without obtaining in either case the prior permission of such political party, person or authority and such voting or abstention has not been condoned by such political party, person or authority within fifteen days from the date of such voting or abstention."

Section 8 of the Act empowers the State Government to frame rules for carrying out the purposes of the Act by issuing notification in the Official Gazette. In pursuance of the said provision, the State Government has framed the Rules as well as the Amendment Rules. Since rule 6 is extensively referred to and relied on by the learned advocates, it is reproduced verbatim as under :-

> "**6 : References to be by petitions :** (1) No reference of any question as to whether a councillor or member has become subject to disqualification under the Act shall be made except by a petition in relation to such councillor or member made in accordance with the provisions of this rule.
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> (2) A petition in relation to a councillor or member may be made in writing to the Chief Secretary to the Government of Gujarat or designated Officer by any other councillor or, as the case may be, member.
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> (3)Before making any petition in relation to any councillor or member, the petitioner shall satisfy himself that there are reasonable ground for believing that a question has arisen as to whether such councillor or member has become subject to disqualification under the Act.
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> (4) Every petition,
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> (a) shall contain a concise statement of the material facts on which the petitioner relies; and
>
> (b) shall be accompanied by copies of the documentary evidence if any, on which the petitioner relies and where the petitioner relies on any information furnished to him by any person a statement containing the names and address of such person and the gist of such information as furnished by each such person.
>
> (5) Every petition shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 for the verification of pleading.

(6) Every annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition."

Rule 7 prescribes the procedure of filing the petition. The relevant part of the said rule is reproduced below :-

"**7. Procedure :** (1) On receipt of a petition under Rule 6 of the Chief Secretary to the State Government or the designated officer shall consider whether the petition complies with the requirement of rule.

(2) If the petition does not comply with the requirements of rule , the Chief Secretary or as the case may be, the designated officer shall dismiss the petition and intimate the petitioner accordingly.
(3) If the petition complies with the requirements of rule 6, the Chief Secretary or, as the case may be, the designated officer shall cause copies to the petition and of the annexures thereto to be forwarded :-
(a) to the councillor or member in relation to whom the petition has been made; and
(b) where such councillor or member belongs to any municipal party or a panchayat party and or such petition has not been made by the leader thereof also to such leader, and such or councillor, member or leader shall, within seven days of the receipt of such copies, or within such further period as the designated officer may for sufficient cause allow, forward his comments in writing thereon the Chief Secretary or the designated officer."

It is alleged by respondents no. 3 to 6 that since event of defection has taken place, the petitioners are liable to be disqualified under the provisions of section 3. It is the say of the petitioners that no such mandate was given by the party

and, therefore, the petitioners cannot be said to have acted in contravention of the mandate of the party. This dispute is, however, based on the facts and, therefore, it is not possible for me to decide it in this petition. It is no-doubt the case of the petitioners that in accordance with rule 10, which has been introduced by way of an amendment, a councilor or a member elected on the symbol of political party is required to ensure whether any mandate is issued by his political party while attending any meeting of the local body and if such mandate is issued by such political party, he should obtain such mandate from such political party. It also envisages that chairperson of the meeting to verify that such a mandate is issued by political party and circulated to the councilors or the members of the local body. In the instant case, the minutes of the meeting dated 02/07/2007, which have been produced on record, do not reflect any such mandate having been ascertained by the chairperson, but from that fact alone it is difficult to say with certainty that no mandate was given by the party to support and vote for the party's presidential candidate, namely Mr. Dabhi. Such fact can only be ascertained during the detailed inquiry, that can be made by the Designated Officer. Hence, there is no need for me to express any opinion or give finding on that count.

7. So far as the submission of Mr. Pahwa with regard to reference to be made on petition by the members or councilors alone is concerned, the aforesaid provisions of rule 6 and in particular sub-rule (2) thereof, shows that

such petition may be made in writing to the Chief Secretary, Government of Gujarat or Designated Officer by any other councilor or as the case may be, by member. It may be noted here that in rule 6 (1), (3), (4), (5) and (6) the legislature has used the word *"shall"*; whereas in this rule the word *"may"* has been used. It is, therefore, clear that this requirement is not mandatory, but it is directory. In other words, if the rule is read in its entirety, it clearly shows that word *'may'* is required to be given its ordinary dictionary meaning which is relevant for this purpose is "expressing permission, expressing a wish or desire" and there is no need to give any other meaning. Legislative intent is eloquent as in rest of the provisions of this rule word *"shall"* is used. Sub-rule (1) makes the compliance of the requirements prescribed in rule 6 compulsory or mandatory, but so far as making of the petition is concerned, in sub-rule (2) it is provided that it may be made in writing by any other councilor or member. Further, so far as the first part of this requirement is concerned i.e., the petition to be made in writing, considering the subsequent provisions of this rule, it appears to be mandatory. There are mandatory requirement that in the petition, the petitioner has to make concise statement of material facts, he has to sign it and also verify it in accordance with provisions of CPC; he has to sign and verify the documents to it and if the petition is based on information, he has to state the source and detailed address, etc. Unless the petition is in writing this is not possible. Further this reasoning gets support from provisions of clause (b) of sub-rule (3) of rule 7, which reads as under :-

> "(3) (a) xxx xxx xxx xxx
>
> (b) where such councillor or member belongs to any municipal party or a panchayat party and or such petition has not been made by the leader thereof also to such leader, and such or councillor member or leader shall, within seven days of the receipt of such copies, or within such further period as the designated officer may for sufficient cause allow, forward his comments in writing thereon the Chief Secretary or the designated officer."

The aforesaid provision is self-explanatory. It requires that if the petition is not made by the leader of the party, the designated authority has to forward a copy to him. It means that even leader of the party can file petition, irrespective of the fact whether he is member or councilor. I am, therefore, of the opinion that merely because along with two councilors the petition has been filed by the President as well as Secretary of the BJP, it cannot render the petition defective and liable to be dismissed for non-compliance of provisions of sub-rule (2) of rule 6, so far it relates to making of the petition by a member or a councilor is concerned.

8. The last submission of Mr. Pahwa relates to sub-rules (5) and (6) of Rule 6. They require the petitioner to sign and verify the petition and annexures thereto in the manner laid down in the CPC. In his submission verification of the petition is not in accordance with the requirement of Order 6 Rule 15 of the CPC, which reads as under :-

> **"Order 6 Rule 15 : Verification of pleadings** : (1) Save as otherwise provided by any law for the time being in force, every pleading shall be

varied at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.

(2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true.

(3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed."

It is also an admitted fact that the annexures to the petition are neither verified nor signed by any of the respondents nos. 3 to 6. Whether these provisions are mandatory and non-compliance thereof will prove fatal to the proceedings is to be seen. Submission of Mr. Pahwa is that their compliance is mandatory; whereas it is submitted by Mr. Shah as well as Mr. Thakkar that the defect can be cured at a later stage also and this cannot be a ground for dismissing a petition. Mr. Pahwa has placed reliance on the decision rendered by the learned Single Judge of this Court in the case of Amrubhai Nagbhai Maitra v/s. Competent Authority in Special Civil Application No. 11015 of 2001 dated 05/09/2003. The learned Single Judge has held as under :-

> "16. From the foregoing discussion about statutory provisions, it becomes crystal clear that if conditions laid down in Rule 6(5) of the Rules are not satisfied, the petition is required to be dismissed as per the provisions contained in Rule 7(2) of the Rules. Whether these Rules are mandatory or directory, can be decided on the basis of fact as to whether they provide any consequence as held by the Supreme Court in the case of Sharif-Un-Din vs. Abdul Gani Lone (Supra). Here in the present case, Rule 7(2) prescribes the consequence of dismissal of petition and hence the case squarely falls within the ratio laid down by the Hon'ble Supreme Court.

As against that, Mr. Shah and Mr. Thakkar both have placed reliance on the decision rendered by another learned Single Judge of this Court in Special Civil Application No. 7015 of 1995 dated 16/8/1996 in the case of Pushpendra Chandra Prakash Sharma v/s. State of Gujarat. The learned Single Judge has held as under :-

> "21. In the instant case, the defect pointed out in the petition is that annexures are not signed and verified by the applicant (respondent No.3) as required by Rule 6(6) of the Rules of 1987. Thus, on the face, there appears to be noncompliance of sub-rule (6) of Rule-6. According to Mr K.S.Zaveri, learned counsel, the effect of noncompliance of sub-rule (6) of Rule 6 is that the Chief Secretary or the Designated Officer was left to no option but to dismiss the petition. He further submits that sub-rules 1 and 2 of Rule 7 casts a duty on the Designated Officer to ensure that the petition is in conformity with the Rules. The mandate under the Sub-rule (2) of Rule-7 is that if the provision has not been complied with, the petition shall be dismissed. Mr Zaveri submits that the sub-rule (6) is analogous of section 83(1)(c) of Representation of Peoples Act, 1951, which provides that any Schedule or Annexure to the petition shall be signed by the petitioner and verified in the same manner as the petition. The effect of noncompliance is rejection of the petition under the provisions of section 86(1). On the other hand, Miss V.P.Shah, Senior Advocate, appearing for the respondent No.3, submits that, at the first instance, sub-rule (6) of Rule-6 is not mandatory on the anology of the section-83(1)(c) of the Act of 1951, and secondly, even if it is so, factually the Annexure are not integral

part of the petition and such petition can not be rejected on the ground of Annexure being not signed and verified as required by Rule 6(6).

22. I have given my anxious and thoughtful consideration to the rival contentions. The lure of office or other similar consideration, has given rise to evil of political defection, which has brought in Legislature anarchism, endangering the foundation of Democracy. Thus, the defection law at all level. Bearing this in mind, Rule 6(6) and Rule 7(2) providing the consequences of non-compliance, is considered. The normal rule is where a statute requires a particular act to be done in a particular manner and also lays down that failure to comply with the said requirement leads to specific consequences, it must lead to that consequences and no other consequences. Dealing with the provisions of section 81(3) of the Act of 1951, which provides that every election petition shall be accompanied by copies of the petition for respondents and shall be attested by the petitioner under his own signature to be true copy of petition and provision of section 86(1) which provides consequences of non-compliance of provision of section 81 i.e. dismissal of the petition, Appex Court in numerous cases held that there is no option with the High Court but to dismiss petition. Though Rule 6(6) is analogous to section 83(1)(c) of the Act of 1951, but the consequence of noncompliance of section 83(1)(c) is not provided as dismissal under section 86. However, in Dr. (Smt.) Shipra etc vs. Shantilal case, a decision reported in J.T. 1996(5) SC 681, Apex Court held that sections 81, 83(1)(c) and 86 read with Rule 94(A) of the Rules and Form 25 are to be read jointly as integral scheme. In F.A.Sapa etc. vs. Lathuthanga reported in AIR 1991 SC 1557, the Apex Court held that if the schedule and annexure forms an integral part of the election petition itself, strict compliance would be insisted upon.

23. What is annexure has been considered by the Panjab & Haryana High Court in case of Panna vs. Mukhtiar Singh reported in AIR 1972 P & H 451. The Court after referring to dictionary meanings of annexure and English cases, held that an annexure would necessarily be a part of the petition, if there is a substantial reference in the petition. On the other hand, the election petition makes a reference to certain proposition of law. It will not be strictly an annexure and cannot be considered as integral part of the petition.

24. In the instance case, there are six annexure. The First Annexure is xerox copy of the Gujarat Government Extra Ordinary Gazette. Annexure-2 is a letter from the President of Kachcha District, B.J.P. regarding appointment of the Municipal Leader. Annexure-3 is a copy of the letter in form No.1. Annexure-4 is a xerox copy of the circular by the Collector, Kachcha for calling a meeting for the election of the President. Annexure-5 is a copy of the proposal as President in the prescribed form. Annexure-6 is a copy of the proposal in the prescribed form in the name of Pushpendra C. Sharma as President."

Mr. Shah has also placed reliance on the decision of the Apex Court rendered in the case of Uday Shankar Triyar v/s. Ram Kalewar Prasad Singh reported in (2006) 1 S.C.C. 75. The Apex Court has held as under :-

"15. It is, thus, now well settled that any defect in signing the memorandum of appeal or any defect in the authority of the person signing the memorandum of appeal, or the omission to file the

vakalatnama executed by the appellant, along with the appeal, will not invalidate the memorandum of appeal, if such omission or defect is not deliberate and the signing of the memorandum of appeal or the presentation thereof before the appellate court was with the knowledge and authority of the appellant. Such omission or defect being one relatable to procedure, can subsequently be corrected. It is the duty of the office to verify whether the memorandum of appeal was signed by the appellant or his authorised agent or pleader holding appropriate vakalatnama. If the office does not point out such defect and the appeal is accepted and proceeded with, it cannot be rejected at the hearing of the appeal merely by reason of such defect, without giving an opportunity to the appellant to rectify it. The requirement that the appeal should be signed by the appellant or his pleader (duly authorised by a vakalatnama executed by the appellant) is, no doubt, mandatory. But it does not mean that non-compliance should result in automatic rejection of the appeal without giving an opportunity to the appellant to rectify the defect. If and when the defect is noticed or pointed out, the court should, either on an application by the appellant or suo motu, permit the appellant to rectify the defect by either signing the memorandum of appeal or by furnishing the vakalatnama. It should also be kept in view that if the pleader signing the memorandum of appeal has appeared for the party in the trial court, then he need not present fresh vakalatnama along with the memorandum of appeal, as the vakalatnama in his favour filed in the trial court will be sufficient authority to sign and present the memorandum of appeal having regard to Rule 4(2) of Order 3 CPC, read with Explanation (c) thereto. In such an event, a mere memo referring to the authority given to him in the trial court may be sufficient. However, filing a fresh vakalatnama with the memo of appeal will always be convenient to facilitate the processing of the appeal by the office."

Again it is observed as under :-

> "17. Non-compliance with any procedural requirement relating to a pleading, memorandum of appeal or application or petition for relief should not entail automatic dismissal or rejection, unless the relevant statute or rule so mandates. Procedural defects and irregularities which are curable should not be allowed to defeat substantive rights or to cause injustice. Procedure, a handmaiden to justice, should never be made a tool to deny justice or perpetuate injustice, by any oppressive or punitive use. The well-recognised exception to this principle are :
>
> (i) where the statute prescribing the procedure, also prescribes specifically the consequence of non-compliance;
>
> (ii) where the procedural defect is not rectified, even after it is pointed out and due opportunity is given by rectifying it;
>
> (iii) where the non-compliance or violation is proved to be deliberate or mischievous;
>
> (iv) where the rectification of defect would affect the case on merits or will affect the jurisdiction of the court;
>
> (v) in case of memorandum of appeal, there is complete absence of authority and the appeal is presented without the knowledge, consent and authority of the appellant."

It may be noted here that so far as Order 6 Rule 15 is concerned, sub-rule (2) thereof prescribes the manner in which the verification has to be made. In the petition filed before the designated authority, respondents nos. 3 to 6 have not specifically stated what the petitioners verified was of their own knowledge and what they verified was upon the information received and

believed to be true. The annexures to the petition are neither verified nor signed. It is the submission of Mr. Shah as well as Mr. Thakkar that in view of the decision of the Apex Court in the case of Uday Shankar Triyar [supra], this defect cannot entail dismissal of the proceedings and party can be permitted to amend the petition and cure the defect. However, this decision not only does not support them but on the contrary it goes against the respondents. It is very clearly observed by the Apex Court that the defect should not entail automatic dismissal or rejection unless the relevant statute or law or rule so mandates. The Apex Court has specifically enumerated the exceptions to the proposition of law relied on by Mr. Shah and Mr. Thakkar. It says that where the statute prescribing the procedure, also specifically prescribes the consequences of non-compliance this proposition of law will not apply. In the instant case, sub-rule (2) of rule 7 clearly specifies that if petition does not comply with requirements of rule 6, the Designated Officer or the Chief Secretary shall dismiss the petition and intimate the petitioner accordingly. According to rule 7, on receipt of the petition, the Chief Secretary or the Designated Officer has to ascertain and consider whether the petition complies with the requirement of rules and if it is found to be not complying, the dismissal has to follow. Thus, the authority has not been given any option but to dismiss the petition. It is the submission of Mr. Shah and Mr. Thakkar that the dismissal can entail only when the Designated Officer gives opportunity to the petitioners of such petition to amend it or correct or cure defects and inspite of that the defects are

not cured, then only such petition can be dismissed. I am not inclined to accept the submission because unlike rule 17 and rule 18 of the CPC there is no such provision in the Rules here. They read as under :-

> **"17. Amendment of pleadings :-** The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties;
>
> Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that inspite of due diligence, the party could not have raised the matter before the commencement of trial.
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> **18. Failure to amend order.-** If a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by the orders, or if no time is thereby limited, then within fourteen days from the date of the order, he shall not be permitted to amend after the expiration of such limited time as aforesaid or of such fourteen days, as the case may be, unless the time is extended by the Court."

Here upon receiving the petition, under rule 7(1) of the Rules it is the duty of the Designated Officer to ascertain whether petition complies with the requirements prescribed under rule 6 and if it is found wanting, the next step he has to take is to dismiss the petition and intimate the petitioners the dismissal of petition. The intimation of the defect and consequence thereof are to follow the dismissal and not precede it. There is no provision in the Rules, like rules 17

and 18 of Order 6 of CPC, which can authorize the Designated Officer to permit the party to amend the pleadings and only upon failure to amend after permission or order, to dismiss it.

It may also be noted here that respondents nos. 3 to 6 have themselves stated in the petition that they place complete reliance on the annexures and they are to be treated as integral part of the petition and, therefore, these annexures also ought to have been signed and verified in accordance with sub-rule (6) of rule 6. But neither the signature is there nor any verification. The ratio laid down in the case of Pushpendra Chandra Prakash Sharma [supra] will not help the respondents no. 3 to 6. Therefore, there is complete non-compliance of mandatory provisions of sub-rules (5) and (6) of rule 6 of the Rules. When there is non-compliance, the Designated Officer ought to have dismissed it without issuing notice to the petitioners; but that has not been done and notice has been issued. When the petition of respondents nos. 3 to 6 is not maintainable at all in law, I do not see any need for petitioners to respond to show cause notice issued in pursuance of such petition and the petitioners are justified in approaching this Court seeking relief under Article 226 of the Constitution of India. The said petition and the notice in pursuance thereof are quashed and set aside. This petition is allowed. Rule made absolute with no order as to costs.

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Mr. Thakkar prays for the stay of the operation of the order for two weeks. Mr. Pahwa has objected to it. However, considering the fact that the mandatory provisions of the rules have been not complied with and also in the facts and circumstances, there is no need to stay the same, the request is rejected.

[Akshay H Mehta, J.]

* Pansala.